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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

OCT 07 2010
at 2 o'clock and min. M.
SUE BEITIA, CLERK

Attorneys for Plaintiff
OLD REPUBLIC NATIONAL
TITLE INSURANCE COMPANY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

OLD REPUBLIC NATIONAL
TITLE INSURANCE COMPANY, a
Minnesota corporation,

Plaintiff,

vs.

THOMAS MOSES JOHNSON, III,
a Hawai'i resident,

Defendant.

Civil No. CV09-00445 SOM KSC
(Breach of Contract)

**FINDINGS AND
RECOMMENDATION GRANTING
[25] PLAINTIFF OLD REPUBLIC
NATIONAL TITLE INSURANCE
COMPANY'S MOTION FOR
DEFAULT JUDGMENT AGAINST
DEFENDANT, FILED APRIL 14,
2010**

Hearing

Date: May 25, 2010

Time: 9:30 a.m.

Judge: Hon. Kevin S. C. Chang

**FINDINGS AND RECOMMENDATION GRANTING
[25] PLAINTIFF OLD REPUBLIC NATIONAL TITLE INSURANCE
COMPANY'S MOTION FOR DEFAULT JUDGMENT
AGAINST DEFENDANT, FILED APRIL 14, 2010**

Plaintiff Old Republic National Title Insurance Company ("Plaintiff" or "Old Republic"), by and through its attorneys, Alston Hunt Floyd & Ing, hereby submits the following proposed findings and recommendation on *Plaintiff Old Republic National Title Insurance Company's Motion for Default Judgment Against Defendant*, filed April 14, 2010 ("the Motion"). The Motion was heard on May 24, 2010, at 9:30 a.m., by the Honorable Kevin S.C. Chang. Stephen M. Tannenbaum appeared on behalf of Plaintiff. Defendant is the only other party to this action, and he did not appear.

Having reviewed the Motion and considering the documents and evidence submitted in support thereof, the representations of counsel, and the files and records herein, and good cause appearing therefore, the Court finds and concludes as follows:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1) because there is complete

diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

2. In 2004, Defendant Thomas Moses Johnson, III (“Johnson”), as borrower and mortgagor, executed two “Home Equity Line of Credit Agreements and Mortgages” in favor of Pentagon Federal Credit Union (“PFCU”), as lender and mortgagee.

3. Specifically, on or about August 26, 2004, for value received, Johnson made, executed and delivered to PFCU (i) a Home Equity Line of Credit Agreement and Federal Truth-in-Lending Disclosure and (ii) a corresponding Mortgage (together, the “August 2004 Credit Agreement”), pursuant to which PFCU agreed to make a loan to Johnson in the maximum principal amount of ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00). The Mortgage was filed in the Office of the Assistant Registrar of the Land Court of the State of Hawai‘i (“Land Court”) as Document No. 3189884 on November 8, 2004.

4. On or about October 6, 2004, for value received, Johnson made, executed and delivered to PFCU (i) a second Home Equity Line of Credit Agreement and Federal Truth-in-Lending Disclosure and (ii) a corresponding Mortgage (the “October 2004

Credit Agreement,” together with the August 2004 Credit Agreement, the “Credit Agreements”), pursuant to which Plaintiff agreed to make a second loan to Johnson in the maximum principal amount of ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00). This Mortgage was filed in Land Court as Document No. 3211894 on December 29, 2004.

5. On September 11, 2008, PFCU, as assignor, executed an “Assignment of Home Equity Line of Credit Agreement and Mortgage” to Old Republic, as assignee, which assigned to Old Republic the August 2004 Credit Agreement. This Assignment was filed in Land Court as Document No. 3797732 on October 14, 2008.

6. On September 11, 2008, PFCU, as assignor, executed a second “Assignment of Home Equity Line of Credit Agreement and Mortgage” to Old Republic, as assignee which assigned to Old Republic the October 2004 Credit Agreement. This Assignment was filed in Land Court as Document No. 3797731 on October 14, 2008.

7. Pursuant to the two Assignments from PFCU to Old Republic, Old Republic was assigned all rights, title and interests possessed by PFCU under the two Credit Agreements.

8. Defendant Johnson stopped making monthly payments on the Credit Agreements beginning October 2007.

9. Due notice was given to Johnson by Old Republic, and, although demand was made upon Johnson for payment of all amounts owing under the Credit Agreements, Johnson has failed and continues to fail to pay the sums due under the Credit Agreements.

10. Defendant Johnson is in default under the terms of the Credit Agreements by reason of his failure to pay the sums due thereunder.

11. Johnson has defaulted under the Credit Agreements and, as of April 14, 2010, owed Plaintiff principal, contract interest and fees, with interest accruing daily, as follows:

a. The August 2004 Credit Agreement:

\$98,399.09	principal
\$12,360.54	interest (accruing daily at the 4.25% variable contract rate, <i>i.e.</i> , \$11.4574 per diem)
\$812.13	late fees
<u>\$32.50</u>	<u>one-time administrative fee</u>

\$111,604.26

b. The October 2004 Credit Agreement:

\$98,972.88 principal

\$12,432.62 interest (accruing daily at the 4.25%
variable contract rate, *i.e.*, \$11.5242
per diem)

\$742.20 late fees

\$32.50 one-time administrative fee

\$112,180.20

12. The evidence submitted by Plaintiff on this motion supports entry of judgment against Defendant for the relief requested.

13. Johnson has also defaulted in this action by failing to respond to Plaintiff's Complaint, and Entry of Default was entered against him in this action on December 23, 2009.

14. The Servicemembers' Civil Relief Act, 50 U.S.C. Appx. § 521, is not a bar to entry of this judgment for the following reasons:

a. First, Defendant appeared in this action by affirmatively requesting relief from this Court in the form of a

direct request for appointment of counsel filed on November 20, 2009.

b. Second, on December 7, 2009, Defendant appeared and argued before the Court at the hearing on that request.

c. Third, even if Defendant had not actually appeared before this Court, despite directions by the Court at the hearing on his request for counsel that Defendant submit evidence of his military service, Defendant has still failed to substantiate his claims of active military service in any way.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Motion is granted. A Default Judgment shall be entered in favor of Plaintiff Old Republic National Title Insurance Company and against Johnson as follows:

1. Plaintiff is awarded damages for breach of contract in the amount of \$223,784.46 (as of April 12, 2010), plus interest that continues to accrue, as follows: (a) at the lower of the variable, contractual interest rate of 4.25% or the 6% statutory interest rate applied to Defendants' accounts per 50 U.S.C. Appx. § 527(a) until

Judgment is entered; and then (b) interest at the Hawai'i statutory rate of 10% from entry of judgment until satisfaction;

2. Plaintiff is awarded its taxable costs and reasonable attorney's fees pursuant to the terms of the Agreements and Hawai'i Revised Statute, § 607-14, through May 31, 2010, (inclusive of tax) as follows: taxable costs in the amount of \$549.13 and reasonable attorney's fees in the amount of \$19,574.34, for a total of \$20,123.47, as supported by Plaintiff's counsel's declaration and supporting invoices dated June 3, 2010, which supplements and updates Plaintiff's counsel's declaration dated April 14, 2010.

3. The Judgment shall be entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as there is no just reason for delay.

DATED: Honolulu, Hawai'i, OCT 07 2010.



Kevin S.C. Chang

United States Magistrate Judge

Old Republic National Title Insurance Company v. Thomas Moses Johnson, III; Civ. No. CV09-00445 SOM KSC; United States District Court for the District of Hawai'i; **FINDINGS AND RECOMMENDATION GRANTING [25] PLAINTIFF OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT, FILED APRIL 14, 2010**